



BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300

guy.hicks@bellsouth.com

October 30, 2001

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Guy M. Hicks
General Counsel
615 214 6301
Fax 615 214 7406
EXECUTIVE SECRETARY

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Formal Complaint of Universal Telecom, Inc.*
Docket No. 01-00613

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Responses to Universal Telecom's Motion for Judgment on the Pleadings. A copy is being provided to counsel for Universal Telecom.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Formal Complaint of Universal Telecom, Inc.*

Docket No. 01-00613

**RESPONSE OF BELL SOUTH TELECOMMUNICATIONS, INC.
TO UNIVERSAL TELECOM, INC.'S MOTION FOR
JUDGMENT ON THE PLEADINGS**

Universal Telecom, Inc.'s ("Universal") Motion for Judgment on the Pleadings (the "Motion") should be denied. Universal is asking the Tennessee Regulatory Authority (the "Authority") to disregard the express terms of the contract Universal negotiated with BellSouth, rewrite the contract in a way that favors Universal, and to apply the re-written contract retroactively. Moreover, Universal asks that the Authority do all of this based on nothing more than Complaint and the Answer that have been filed in this docket. For the reasons set forth below, the Authority should deny Universal's request.

Universal asks the Authority to order BellSouth to offer Universal the 21.56% discount for resold services or, in the alternative, require BellSouth "to unbundle the OS/DA service from its Agreement with Universal." (Motion at p. 7) On October 11, 2000, Universal and BellSouth executed a nine-state Resale Agreement containing the following provision:

The telecommunications services available for purchase by Universal Telecom, Inc. for the purposes of resale to Universal Telecom, Inc. End Users shall be available at the following discount off of the retail rate. ...

DISCOUNT

<u>STATE</u>	<u>RESIDENCE</u>	<u>BUSINESS</u>	<u>CSAs</u>
...			
TENNESSEE**	16%	16%	

*** In Tennessee, if Universal Telecom, Inc. provides its own operator services and directory services, the discount shall be 21.56%. Universal Telecom, Inc. must provide written notification to BellSouth within 30 days prior to providing its own operator services and directory services to qualify for the higher rate of 21.56%.*

See page 16 of Attachment 1 of Resale Agreement (a copy of which is attached as Exhibit A)(emphasis added).

The contract the parties signed, therefore, expressly provides that the 21.56% discount rate for resold services in Tennessee applies *only if* Universal provides its own operator services and directory services.¹ Universal's own pleading, however, states that Universal does not provide its own operator and directory services. See Complaint at ¶19. If any party is entitled to judgment on these pleadings, therefore, it is BellSouth and not Universal because by its own admission, Universal has not satisfied the condition precedent to receiving the 21.56% resale discount rate.

In an attempt to evade the results of the clear and unequivocal language to which it has agreed, Universal argues that the federal Telecommunications Act of 1996 (the "Act") provide the bases for the TRA to rewrite the Resale Agreement for Universal. Universal, however, is simply wrong. The Act not only allows, but

¹ The Parties negotiated and signed the Resale Agreement well after passage of the federal Telecommunications Act and issuance of Authority orders relating to resale discounts.

affirmatively encourages, parties to negotiate agreements. For example, agreements arrived at through negotiation may be entered into *without regard to the standards set forth in subsections (b) and (c) of Section 251*. See 47 U.S.C. §252(a)(1). As the Authority has recognized, parties are free to negotiate terms and conditions differing from arbitration rulings.

In this case, Universal negotiated mutually-agreeable contractual language and signed a contract containing that language. In hindsight, Universal apparently wishes that it had negotiated different language, and it now is asking the TRA to do for it what Universal failed to do for itself. Universal is not entitled to what it seeks, however, because “Tennessee courts will not rewrite contracts just because they are ill advised or the parties miscalculated future events.” *Wilson v. Scott*, 672 S.W.2d 782, 786 (Tenn. Ct. App. 1984). This is true even with regard to contracts with companies that are regulated by the State. See, e.g., *Angus v. Western heritage Ins. Co.*, 48 S.W.3d 728, 731 (Tenn. Ct. App. 2001) (“We are not at liberty to rewrite an insurance policy simply because we do not favor its terms or because its provisions produce harsh results.”).

For similar reasons, the pleadings do not support Universal’s alternative request that the Authority order BellSouth to “unbundle the OS/DA services from its Agreement with Universal Telecom.” Again, if this is what Universal wanted, it should have negotiated such language or filed for arbitration regarding such language. Having done neither, Universal cannot now ask the TRA to rewrite the contract to say something that it simply does not say.

Finally, when the Authority established the 21.56% resale discount in Dockets 96-01152 and 96-01271, it did so in order to allow AT&T and MCI to use their own operators to provide OS/DA service to their subscribers. The Authority, acting as arbitrators, decided that as a matter of policy, where AT&T and MCI have their own operators, they should be given the opportunity to use them. (See p. 27 of Second and Final Order of Arbitration Awards, entered January 23, 1997). Universal's request to order BellSouth to "unbundle" OS/DA runs counter to the Authority's policy determination because Universal has no intention of providing its own OS/DA service – or any OS/DA service, for that matter -- to its subscribers.²

CONCLUSION

For the foregoing reasons, BellSouth respectfully submits that Universal's Motion should be denied.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____

Guy M. Hicks
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
615/214-6301

² This is one manner in which this matter differs from the Discount Communications proceedings – whereas Universal blocks its end-users' access to OS/DA, Discount Communications did not. Additionally, Discount Communications signed its Resale Agreement with BellSouth before BellSouth began charging for directory assistance – Universal signed its agreement with BellSouth after BellSouth began charging for Directory Assistance.

R. Douglas Lackey
Patrick W. Turner
675 W. Peachtree St, NE, Suite 4300
Atlanta, GA 30375

CERTIFICATE OF SERVICE


I hereby certify that on October 30, 2001, a copy of the foregoing document was served on the parties of record, via the method indicated:

- ☐ Hand
- ☐ Mail
- ☒ Facsimile
- ☐ Overnight

Michael J. Blade, Esquire
Dinsmore & Shohl
414 Union St., #1100
Nashville, TN 37219

- ☐ Hand
- ☐ Mail
- ☒ Facsimile
- ☐ Overnight

John Selent, Esquire
Edward T. Depp, Esquire
Dinsmore & Shohl
462 S. Fourth Ave., #2000
Louisville, KY 40202

A handwritten signature in black ink, appearing to be "Michael J. Blade", written over a horizontal line.